A **VOO NYUK FAH & ANOR**

v.

LAM YAT KHEONG & ANOR

B COURT OF APPEAL, PUTRAJAYA
SULONG MATJERAIE JCA
AZHAR MA'AH JCA
MOHAMED APANDI ALI JCA
[CIVIL APPEAL NO: S-02-1334-2008]
C 15 MARCH 2012

CIVIL PROCEDURE: *Damages - Assessment of damages - Appeal against - Whether trial judge acted on correct principles of law - Whether amount awarded appropriate - Whether assessment consistent with* D *established judicial principles*

The plaintiffs/appellants commenced an action against the defendants/respondents for breach of fiduciary duties and tort of fraud, which was allowed by the High Court. Subsequently, after holding an enquiry and assessment hearing, the Senior Assistant E Registrar gave her decision on the quantum of damages. However, the respondents, not being satisfied with the assessment of damages, appealed to the judge in chambers and the appeal was allowed in part. Hence the appeal by the appellants against the F decision of the judge in chambers on the issue of assessment of damages.

Held (dismissing appellants' appeal with costs)
Per Mohamed Apandi Ali JCA delivering the judgment of the court:

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(1) Taking of accounts and assessment of damages is an exercise of judicial discretion and hence seldom disturbed except where there is clear error on the principles of law or the amount is erroneous and without any basis or justification. *(Flint v.* H *Lovell*, refd) (para 4)

(2) It is of primary importance to be able to appraise the judgment so that the assessment should be in line with the correct understanding of the orders made therein. The learned I trial judge in chambers had adopted the correct initial step in assessing the damages and "the taking of accounts and inquiries and assessment of damages" was conducted pursuant to the said order. (para 8)

(3) Further, the learned judge in chambers did give reasons and explanations as to why she did not make any award in respect of items (4), (6), (7), (9) and (10) which were consistent with the established judicial principles. The learned judge in chambers had also considered all the facts and evidence available before her. Hence, the assessment was in line with the findings and judgment of the trial court and there was no reason to disturb the decision. (paras 9 & 10)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif-plaintif/perayu-perayu memulakan tindakan terhadap defendan-defendan/responden-responden bagi kemungkiran kewajipan fidusiari dan tort bagi fraud, yang dibenarkan oleh Mahkamah Tinggi. Kemudian, selepas membuat siasatan dan perbicaraan taksiran, Penolong Kanan Pendaftar memberikan keputusannya bagi kuantum ganti rugi. Walaubagaimanapun, responden-responden yang tidak berpuashati dengan taksiran ganti rugi, merayu kepada hakim dalam kamar dan sebahagian rayuan tersebut dibenarkan. Maka rayuan ini oleh perayu-perayu terhadap keputusan hakim dalam kamar atas isu taksiran ganti rugi.

Diputuskan (menolak rayuan perayu-perayu dengan kos) Oleh Mohamed Apandi Ali HMR menyampaikan penghakiman mahkamah:

(1) Pengambilan akaun dan taksiran ganti rugi adalah pelaksanaan budi bicara kehakiman dan jarang diganggu kecuali di mana terdapat kesilapan prinsip undang-undang yang jelas atau jumlah yang diberikan adalah salah dan tanpa asas atau justifikasi. *(Flint v. Lovell*, dirujuk)

(2) Kebolehan menilai penghakiman adalah amat penting supaya taksiran yang dibuat selari dengan pemahaman yang betul terhadap perintah yang dibuat. Hakim dalam kamar yang bijaksana menggunakan langkah awal yang betul dalam mentaksir ganti rugi dan "pengambilan akaun dan siasatan dan pentaksiran ganti rugi" dibuat berikutan perintah tersebut.

(3) Selanjutnya, hakim dalam kamar yang bijaksana juga telah memberikan alasan dan penjelasan mengapa beliau tidak memberikan award berkaitan dengan item-item (4), (6), (7), (9) dan (10) yang juga konsisten dengan prinsip-prinsip kehakiman yang mantap. Hakim dalam kamar yang bijaksana juga telah mempertimbangkan kesemua fakta dan keterangan yang

terdapat di hadapan beliau. Maka, taksiran tersebut adalah sejajar dengan penemuan dan penghakiman mahkamah bicara dan tidak ada sebab untuk mengganggu keputusan tersebut.

Case(s) referred to:

Bonham-Carter v. Hyde Park Hotel [1948] 64 TLR 177 ***(refd)***
C & P Harlage v. Middleton [1983] 3 All ER 94 ***(refd)***
Flint v. Lovell [1935] 1 KB 345 ***(refd)***
Fraser & Neave Ltd v. Yeo Hiap Seng Ltd [1989] 1 CLJ 275; [1989] 2 CLJ (Rep) 809 CA ***(refd)***
Livingstone v. Rawyard Cool Co [1990] 5 App 25 ***(refd)***
Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***
Subramaniam Paramasivam & Ors v. Malaysian Airline System Bhd [2002] 1 CLJ 230 HC ***(refd)***
Sum Kum v. Devaki Nair & Anor [1963] 1 LNS 131 FC ***(refd)***
Tan Geok Khoon & Gerard Francis Robless v. Paya Terubong Estate Sdn Bhd [1987] 1 LNS 79 ***(refd)***
Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC ***(refd)***
Tito v. Waddell (No 2) [1977] Ch 106 ***(refd)***

For the appellants - Norbert Yapp (Tracy Voo with him); M/s AY Partner
For the respondents - Michael Denis Tan; M/s Michael Denis Tan & Co

[Appeal from High Court, Tawau; Civil Suit No: T(22) 17-1999]

Reported by S Barathi

JUDGMENT

Mohamed Apandi Ali JCA:

Introduction

[1] This is an appeal by the plaintiffs/appellants against the decision of judge in chambers over the sole issue of assessment of damages. Prior to that, it was the defendants/respondents who appealed to the judge in chambers against the decision of the senior assistant registrar ("SAR"). The whole matter on the assessment of damages, emanated from the decision in the substantive civil suit between the parties, given on 4 April 2002.

[2] The chronology of events leading to this appeal are as follows:

1. The writ of summons was filed by the plaintiffs on 22 April 1999.

2. After a full trial, the High Court gave judgment in favour of the plaintiffs on 4 April 2002.

3. The SAR gave her decision on the quantum of damages, after holding on enquiry and assessment hearing, on 23 November 2005.

4. Not satisfied with the said SAR's decision, the defendants filed an appeal to judge in chambers on 2 December 2005.

5. The judge in chambers, allowed in part, the appeal by the defendants on 10 October 2008.

6. Now, the plaintiffs, not satisfied with the learned High Court's decision, appealed to this court, *vide* notice of appeal dated 3 November 2008.

[3] To fully appraise and appreciate the issue at hand, it is pertinent to look at the judgment of the High Court given on 4 April 2002. The sealed order of that judgment reads as follows:

In The High Court In Sabah & Sarawak
At Tawau

Civil Suit No. T(22) 17 of 1999

Between

Voo Nyuk Fah @ Peter	...	1st Plaintiff
Tawau City Motors Sdn Bhd (Company No.183251 D)	...	2nd Plaintiff

And

Lamyat Kheong	...	1st Defendant
Wong Kim Yin	...	2nd Defendant

JUDGMENT

(Order 42, r.5)

The 4th day of April 2002

This action having been tried before the Honourable Mr. Justice Datuk Richard Malanjum on the 30th & 31st October 2000; 1st, 2nd & 3rd November 2000 and 30th November 2000.

It is this day adjudged that judgment be entered for the Plaintiffs against the Defendants as follows:

1. The 1st and 2nd Defendants do pay the liquidated sum of RM290,425.31 to the 2nd Plaintiff;

2. It is Ordered that an account of all monies and receipts earned from the use by the 1st and 2nd Defendants whether by themselves, their servants or agents of the 2nd Plaintiff's tractors be taken;

3. The 1st and 2nd Defendants are hereby Ordered to pay to the 2nd Plaintiff all sums found to be due on the taking of the account under (2) above;

4. The 1st and 2nd Defendants are hereby Ordered to deliver up whether by themselves, their servants agents or the business City Motors the 4 units of tractors, namely registrations Nos. WAU8311, ST790B, SA6270J & SA6271J in good condition or payment of their value thereof assessed in the year 1993 less all the installments paid to the finance companies for the hire purchase facilities but excluding the RM38,562.00 withdrawn by the Defendants from the refinancing sum of RM200,000.00 in respect of the two used tractors;

5. Damages to be assessed;

6. Interest at 4% per annum from the date of the commencement of the action [22nd April 1999] to the date of Judgment pursuant to section 11 Civil Law Act 1956;

7. Statutory interest at 8% per annum from the date of Judgment until date of full payment; and

8. That the 1st and 2nd Defendants do pay the Plaintiffs the costs of this action to be taxed, if not agreed.

Dated the 4th day of April 2002

Seal.

Sgd.
...
Deputy Registrar
High Court Registry
Tawau

This Judgment is taken out by C. Robertson, Advocate & Solicitor for the Plaintiffs whose address for service is 1025 (1st Floor) Jalan Dunlop Tawau P.O. Box 688, 91008 Tawau Sabah Malaysia Tel: 60-(089)-763560 Fax: 60-(089)-7625585 E-mail: dtkmyh@tm.net.my

[4] It must be noted that the action by the plaintiffs in this case was for breach of fiduciary duties and tort of fraud by the defendants. The learned trial judge gave judgment for the plaintiffs as prayed in their statements of claim.

Decisions Of The SAR And The Judge In Chambers

[5] It is obvious that the decisions of the learned SAR and that of the learned judge in chambers on the taking of accounts and assessment of damages are not the same. To scrutinize the difference, it is best to tabulate them as follows:

Item No.	SAR's award	Judge's award
(1) (Accounts for the years 1994 to 1998)	RM619,986.90	RM128,698.22
(2) (Accounts for the years 2000 to 2003 payable by 1st Respondent)	RM70,834.64	RM49,487.30
(3) (Accounts for the years 2000 to 2003 payable by 2nd Respondent)	RM50,941.00	RM47,765.00
(4) Liquidated damages	RM38,562.00	Nil
(5) Amount paid into Court	RM290,425.31	RM290,425.31
(6) Loss of depreciation in value of tractors sold in 2003	RM406,760.04	Nil
(7) Loss of no audited account for period July 1998 to June 1999	RM123,997.38	Nil
(8) Loss of income of 4 tractors from 1994 to 2003	RM1,499,321.20	RM1,000.00
(9) Damages for economic loss in car trading business	RM2,362,847.80	Nil
(10) Damages for loss of wages (Payable to 1st Appellant)	RM29,034.00	Nil

A **The Law On Assessment Of Damages**

[6] It is trite law that the task of taking of accounts and assessment of damages is an exercise of judicial discretion. Such discretion is a judicial one, as it is not to be exercised based on B whims and fancies, but by reference, guidance and application of established judicial principles and of course having regard to all the facts and evidence adduced before the officer or the judge who undertakes the assessment.

C **[7]** In our view the basic governing principles may be stated as follows:

1. The burden of proving damages is always on the parties claiming the damages. See *Tan Geok Khoon & Gerard Francis Robless v. Paya Terubong Estate Sdn. Bhd* [1987] 1 LNS 79 D where Justice Edgar Joseph Jr. (as he was then) said:

> This brings to my mind the famous words of Lord Goddard in *Bonham-Carter v. Hyde Park Hotel* [1948] 64 TLR 177:
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> > E Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying: 'This is what I have lost, I ask you to give me these damages. They have to prove it. F

Such pronouncement was repeated by the same judge in another case, *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn. Bhd.* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635. G

The words of Lord Goddard in *Bonham-Carter v. Hyde Park Hotel* [1948] 64 TLR 177 was also referred to by Thomson LP in *Sum Kum v. Devaki Nair & Anor* [1963] 1 LNS 131. This basic principle is in consonance with the provisions of H s. 101 of the Evidence Act 1950.

2. Corollary to the above, it has also been held that when an enquiry for purposes of assessment is to be done, such enquiry (or taking of accounts) does not raise a presumption I that damage has in fact been suffered. See *Fraser & Neave Ltd v. Yeo Hiap Seng Ltd* [1989] 1 CLJ 275; [1989] 2 CLJ (Rep) 809 at p. 280, where Wee Chong Jin CJ said:

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We should first set out some legal principles applicable to a case such as this. The fact that an inquiry/assessment of damages has been directed pursuant to an undertaking in an injunction does not raise a presumption that damage has in fact been suffered. The purpose of any such inquiry is to establish: (1) the existence; and (2) the extent of any damage.

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If the party concerned has an arguable case for claiming damages, the court would, as a matter of justice, make an order for an inquiry to enable that party to pursue it. The inquiry would of course be at that party's risk as to costs (see *McDonald's Hamburgers Ltd v. Burgerking (UK) Ltd*, a decision of the English Court of Appeal).

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The onus of proof lies on the party who asserts that it has sustained damage, and it must be proved that the damage was caused by the injunction (see A*ir Express Ltd v. Ansett Transport Industries (Operations) Pty Ltd*, a decision of the High Court Australia.

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3. In awarding damages, be it for breach of contract or in the commission of tortuous act, the principle of *"restitution in integrum"* applies. In common parlance, it means that damages in terms of monetary compensation can be awarded to replace an injured party in the same or original position occupied (or enjoyed) by him before the occurrence of the injury or wrongful act. See *Livingstone v. Rawyard Cool Co.* [1990] 5 App. 25 which was referred to in *Subramaniam Paramasivam & Ors v. Malaysian Airline System Bhd.* [2002] 1 CLJ 230.

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4. In awarding damages too, the plaintiff should not be allowed to profit or gain by it. See: *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn. Bhd* [1995] 1 CLJ 15, where the Federal Court relied on the decision in the English case of *C & P Harlage v. Middleton* [1983] 3 All ER 94. Application of such principle can also in seen in an earlier English case of *Tito v. Waddell (No. 2)* [1977] Ch. 106.

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As the appellate court, we are mindful that since the assessment of damages is an exercise of judicial discretion, such assessment is seldom disturbed unless there is clear error on the principles of law or that the amount is erroneous and without any basis and justification. On this approach, we are reminded of what Greer LJ said in *Flint v. Lovell* [1935] 1 KB 345, which reads as follows:

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> … the court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages, it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

Analysis Of The Assessment By Judge In Chambers

[8] Upon perusal of the grounds for her decision, we observed that the learned judge had adopted the correct initial step in assessing damages. The learned judge took pain to examine the judgment (dated 4 April 2002) of the learned trial judge. This is correct as "the taking of accounts and inquiries and assessment of damages" was conducted pursuant to the said order. It is of primary importance to be able to appraise that judgment so that the assessment should be in line with the correct understanding of the orders made therein. In particular, we note that the learned judge correctly interpreted item 4 of the judgment to be alternative orders. This is so, as the word "or" therein did give material effect, for it to be read as alternative orders.

[9] We also note that the learned judge did give reasons and explanations as to why she did not make any award in respect of items (4); (6); (7); (9) and (10). The reasons and explanations given are, to our mind, consistent with the established judicial principles as set out earlier in this judgment, and the learned judge had also considered all the facts and evidence available before her.

Conclusion

[10] For the above reasons, we could not find any plausible reason to disturb the decision of the learned judge in chambers in her assessment of damages. Furthermore, as can be seen in the grounds of decision, the assessment was in line with the findings and judgment of the trial court.

[11] The appeal by the appellants/plaintiffs is hereby dismissed with costs.